

The Maryland Home
Improvement Commission

v. Gary C. Hicks
t/a G.C. Hicks Contractors
(Contractor)
and the Claim of
Denise & Edward Henderson
(Claimant)

* BEFORE THE
* MARYLAND HOME IMPROVEMENT
* COMMISSION
*
* MHIC No.: 13 (05) 394
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FINAL ORDER

WHEREFORE, this 8th day of September 2015, Panel B of the Maryland Home
Improvement Commission **ORDERS** that:

1. The Findings of Fact set forth in the Proposed Order dated January 20, 2015 are **AFFIRMED**.
2. The Conclusions of Law set forth in the Proposed Order dated January 20, 2015 are **AFFIRMED**.
3. The Proposed Order dated January 20, 2015 is **AFFIRMED**.
4. This Final Order shall become effective thirty (30) days from this date. During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.

Joseph Tunney
Joseph Tunney, Chairperson
PANEL B

MARYLAND HOME IMPROVEMENT COMMISSION

PHONE: 410-230-6309 • FAX: 410-962-8482 • TTY USERS, CALL VIA THE MARYLAND RELAY SERVICE
INTERNET: WWW.DLLR.MARYLAND.GOV • E-MAIL: MHIC@DLLR.STATE.MD.US

IN THE MATTER OF THE CLAIM
OF EDWARD AND DENISE
HENDERSON,
CLAIMANTS,
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF GARY C. HICKS,
t/a G.C. HICKS CONTRACTORS,
LLC,
RESPONDENT

* BEFORE STUART G. BRESLOW,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: DLR-HIC-02-14-18711
* MHIC No.: 13 (05) 394
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RECOMMENDED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On March 6, 2014, Edward and Denise Henderson (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$7,910.51 for actual losses allegedly suffered as a result of a home improvement contract with Gary C. Hicks, t/a G.C. Hicks Contractors, LLC (Respondent).

I held a hearing on September 3, 2014 at the Office of Administrative Hearings (OAH), Kensington, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a) and 8-407 (2010 & Supp. 2014).

Hope Sachs, Assistant Attorney General, Department of Labor, Licensing and Regulation (DLLR), represented the Fund. The Claimants were present and represented themselves. The Respondent appeared on his own behalf.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of DLLR, and the Office of Administrative Hearings (OAH) Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2014), Code of Maryland Regulations (COMAR) 09.01.03.01; 09.08.02.01; and 28.02.01.01.

ISSUE

Did the Claimants sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

- Claimant Ex. 1: Contract between Claimants and Respondent, April 27, 2010
- Claimant Ex. 2: Copy of check in the amount of \$3,500.00 from Claimant to Respondent, dated April 27, 2010
- Claimant Ex. 3: Letter from Gatestone Homeowners Association to Claimants, August 5, 2010
- Claimant Ex. 4: Location Survey, February 8, 2008
- Claimant Ex. 5: Application for Residential Building Permit, 2 White Oak Vista Court, Silver Spring, Maryland (Property), August 20, 2010
- Claimant Ex. 6: Failed Inspection Report for Footing, Piers, Foundation, November 22, 2010
- Claimant Ex. 7: Email from Claimant Denise Henderson to Respondent, March 13, 2012
- Claimant Ex. 8: Complaint filed by Claimants with the Montgomery County Department of Permitting Services, March 23, 2013

- Claimant Ex. 9: Copy of check in the amount of \$4,000.00 payable to the Respondent, April 25, 2012
- Claimant Ex. 10: Building Permit issued to Al Johnson for construction of a deck on the Property, August 19, 2010
- Claimant Ex. 11: Montgomery County Department of Permitting Services, history of permit number 546827
- Claimant Ex. 12: Four photographs of the deck, date unknown2
- Claimant Ex. 13: Copy of check in the amount of \$3,000.00 payable to Respondent from Claimant, June 15, 2012
- Claimant Ex. 14: Letter from Claimants to Respondent, September 12, 2012
- Claimant Ex. 15: Proposal from Long Fence to Claimants for construction of deck, March 30, 2010
- Claimant Ex. 16: Order from DLLR to Respondent, October 17, 2012
- Claimant Ex. 17: Letter from Michelle Escobar to Claimants, February 25, 2013
- Claimant Ex. 18: Letter from Joseph Tunney, Chairman, MHIC to Respondent, November 12, 2013
- Claimant Ex. 19: Email from Carlton Meyer, Tri-County Fence Sales, to Claimants, July 25, 2013
- Claimant Ex. 20: Building Permit, issued December 27, 2012
- Claimant Ex. 21: Contract Proposal from ABE-Remodeling Co, Inc., September 18, 2013 with a check in the amount of \$3,008.00 from the Claimants to ABE Remodeling Co., Inc. dated December 14, 2013; a check in the amount of \$750.00 dated January 17, 2013; and a check in the amount of \$750.00 dated February 14, 2013
- Claimant Ex. 22: Order form for materials from TW Perry, October 11, 2013
- Claimant Ex. 23: Home Improvement Claim Form from Claimants, August 8, 2013

I admitted the following exhibits on the Fund's behalf:

- GF Ex. 1: Notice of Hearing, with Hearing Order, dated July 2, 2014
- GF Ex. 2: Licensing status with MHIC for Respondent, inquiry September 2, 2014

GF Ex. 3: Letter from Joseph Tunney to Respondent, March 6, 2014 with attached amended claim

I admitted the following exhibits on behalf of the Respondent:

- Respondent 1 Text log between Claimants and Respondent, June 28, 2011 to September 6, 2012
- Respondent 2 Letter from Respondent to Kris King, Assistant Attorney General, DLLR, faxed July 8, 2013

Testimony

The Claimant, Denise Henderson, testified on her own behalf, as did Gary C. Hicks on behalf of the Respondent.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was licensed by the MHIC as a home improvement contractor, License No. 01-4179964. The Respondent's license expired in October 2013.
2. On April 27, 2010, the Claimants and the Respondent entered into a contract to build a deck on the home owned by the Claimants for the amount of \$11,500.00 (Project). A down payment of \$3,500.00 was given to the Respondent upon signing the contract.
3. Construction of the Project was scheduled to begin two weeks after obtaining permits. The estimated completion date for the Project was four to six weeks after obtaining the necessary permits.
4. In addition to obtaining construction permits, the Claimants were required to obtain approval of the design for the deck by the Gatestone Homeowners Association, Inc. Approval by Gatestone was not received until August 5, 2010.

5. Application for the construction permits was submitted to the Montgomery County Department of Permitting Services (MCDPS) on August 18, 2010, and approval was received the following day, August 19, 2010.
6. The footings for the deck were dug following receipt of the permits; however, the footings failed inspection on November 22, 2010.
7. The Respondent advised the Claimants that repair of the footings would have to take place in the spring of 2011, because they had filled with water and it would be difficult to have them pass inspection until the holes were dried out following the winter months.
8. The footings were not repaired as promised in the spring of 2011.
9. During the spring of 2011, the Claimant, Mr. Henderson, advised the Respondent to hold off working on the Project because he and his wife were having financial difficulties.
10. After filing a complaint with MCDPS, and after complaining directly to the Respondent, the footings were repaired and passed inspection on April 18, 2012.
11. On April 24, 2012, the Claimants issued a check in the amount of \$4,000.00 to the Respondent.
12. The original construction permit had expired on August 20, 2011 and an extension was obtained to enable the Respondent to continue to do the work on the Project.
13. Work continued on the Project. The framing of the Project failed inspection on May 23, 2012, but passed inspection after additional work was performed on May 31, 2012.
14. On June 15, 2012, the Claimants issued a check in the amount of \$3,000.00 to the Respondent in accordance with the contract, leaving a balance due of \$1,000.00 for the completion of the deck.
15. In September 2012, the deck was nearly complete; however, due to the inordinate amount of time to complete the deck, prices of some of the materials to complete the deck had

- increased. The Respondent requested the Claimants pay him \$800.00 of the final payment in order to allow him to purchase materials to complete the deck. At this point, the deck was ninety-five percent complete.
16. The Claimant, Mr. Henderson, agreed with the Respondent that he would pay the Respondent for the purchase of materials to complete the deck, but he wanted to be present when the purchases were made so that he could inventory the materials purchased.
 17. When the Respondent's representative visited the Claimants' home to obtain the check, the Claimant, Mrs. Henderson, refused to give him the requested money and began taking pictures of the van and the individual who approached the Claimant for the check. The Respondent never received the check and did no further work on the Project.
 18. On July 25, 2013, the Claimant, Mrs. Henderson, received an estimate from Tri-County Fence Sales to construct a new deck, including tearing down the work on the deck performed by the Respondent and replacing it with an entirely new deck. The estimated cost for this work was \$13,625.00.
 19. In order to continue construction on the deck, the Claimant, Mrs. Henderson, had to obtain another permit extension because the previous permit extension for the Project had expired.
 20. The Claimants decided to hire another contractor, Abe Remodeling Co., Inc. to provide the labor to finish the deck. The Claimants paid Abe Remodeling Co., Inc. a total of \$4,508.00 for the labor to finish the deck.
 21. The Claimants paid a total of \$4,402.51 in material costs to complete the deck.
 22. The deck is now complete.

23. The Respondent would have finished the deck had he received \$800.00 for the cost of materials to complete the deck.

DISCUSSION

Applicable Law

Section 8-405 of the Business Regulation Article provides that an owner may recover compensation of up to \$20,000.00 from the Fund, “for an actual loss that results from an act or omission by a licensed contractor...” Md. Code Ann., Bus. Reg. § 8-405 (Supp. 2014). Section 8-401 defines “actual loss” as “the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401 (2010). Maryland law provides that a claim against the Fund may be denied if the claimant has “unreasonably rejected good faith efforts by the contractor to resolve the claim.” Md. Code Ann. Bus. Reg. § 8-405(d).

If I determine that the Claimant has suffered an actual loss, COMAR 09.08.03.03B governs the calculation of an award from the Fund:

B. Measure of Awards from Guaranty Fund.

(1) The Commission may not award from the Fund any amount for:

- (a) Consequential or punitive damages;
- (b) Personal injury;
- (c) Attorney's fees;
- (d) Court costs; or
- (e) Interest.

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

Analysis

The parties entered into a contract to perform the Project in April 2010. The Project was slow to start because approvals from the Claimants' homeowner's association had to be received before permits from MCDPS could be obtained in order to start construction. Once permits were obtained on August 18, 2010, work on the Project was slow. The footings that were installed by the Respondent failed MCDPS inspection on November 22, 2010. The winter months were approaching and the footings filled with water. The Respondent recommended that the Project be placed on hold until the spring of 2011 so that the footings could dry out and they could be properly constructed so that they would pass inspection. The footers were not completed in 2011 because Claimant, Mr. Henderson, advised the Respondent that he and his wife were having financial problems. The Respondent testified at the hearing that Mr. Henderson had told him that he should not talk to Mrs. Henderson. The Respondent's testimony was not refuted by the Claimants. There is no reasonable explanation why work on the Project was dormant for more than a year after the footers passed inspection in November 2010. In fact, the email from Mrs. Henderson to the Respondent dated March 12, 2012 (Claimant Ex. 7) supports the conclusion that the Claimants had no problem with the delay in the Project because in this referenced email

Mrs. Henderson requested that the Respondent ask the MCDPS to visit their property to inspect the holes in their yard. She indicated that she wanted the inspection to pass so that she could give the Respondent the next installment. It is obvious from this correspondence that the Claimants did not have a concern with the delay in the Project until this date, which further supports the Respondent's argument that the Claimants, and in particular, Mr. Henderson, wanted the Project placed on hold for a period of time. Prior to this email, there is no documentation from either Claimant stating that they were dissatisfied with the delay in the construction of the Project following the spring of 2011.

On April 18, 2012, the footings finally passed inspection and work on the framing began. Prior to passing inspection, the permit was extended because it had expired. The Claimants paid the Respondent \$4,000.00 in accordance with the Contract on April 24, 2012.

Framing of the deck proceeded, but the framing failed inspection on May 23, 2012. After correcting the deficiencies, the framing passed inspection on May 31, 2012. The Claimant, Mrs. Henderson, testified that the way the deck was framed, there was no access to the HVAC unit under the deck. She showed a picture (Claimant Ex. #12) which illustrates that there were beams over the HVAC unit that prevented access to the HVAC unit for repair or replacement of the unit. She argued that this was poor workmanship on the part of the Respondent. The Respondent, on the other hand, testified that it was his intention to build a trap door or access gate as part of the work to finish the deck. The trap door would enable someone to repair or replace the HVAC unit in the future. In fact, in the contract proposal from Abe Remodeling Co., Inc., the contractor included an access gate similar to what the Respondent planned to install had he been able to finish the Project. Although there were no pictures to verify the current existence of the access gate, it is reasonable to conclude that one was installed by Abe Remodeling, Co., Inc., since this company provided the labor to complete the deck. The absence of a trap door at

the time the Respondent stopped working on the Project is not an indication of poor workmanship. The Respondent merely did not have the time to install it when he stopped work on the Project.

The Respondent completed the floor of the deck. In accordance with the contract, the Claimants paid the Respondents \$3,000.00 on June 15, 2012, leaving only \$1,000.00 left to pay upon the completion of the Project.

At that time, what was left to complete the deck, in addition to the trap door, were the railings and the steps. The Respondent was in communication with the Claimants, and in particular, Mr. Henderson. Text messages were exchanged between the Respondent and Mr. Henderson during the spring and summer of 2012. The Respondent advised Mr. Henderson that the cost of materials had increased since the inception of the contract and that he suggested that the Claimants pay \$800.00 to him to enable him to purchase the remaining materials for completion of the deck. Mr. Henderson agreed but advised that he wanted to be there when the materials were purchased so that he could inventory them. When the Respondent's representative arrived at the Claimants' house to pick up the check, Mrs. Henderson refused to issue a check and instead took pictures of the van and of the representative sent by the Respondent. At that point, no further work on the Project was performed by the Respondent although he was willing to do so had he received \$800.00 to complete the Project.

The Claimants hired Abe Remodeling Co. Inc., to perform the labor to complete the Project which involved a partial dismantling of the deck. The Claimants paid \$4,508.00 for the labor and purchased materials in the amount of \$4,402.51. The deck was completed in the fall of 2013.

Section 8-401 of Maryland's Business Regulation Article defines "actual loss" as "the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike,

inadequate, or incomplete home improvement.” Md. Code Ann., Bus. Reg. § 8-401 (2010). In order for the Claimants to establish an actual loss, they must prove that the costs they incurred to complete the Project were a result of unworkmanlike, inadequate or incomplete home improvement on the part of the Respondent. Having reviewed the record, the Claimants have failed to establish by a preponderance of the evidence that the work performed on the Project by the Respondent was unworkmanlike or inadequate. Although elements of the Project failed to pass MCDPS inspections on more than one occasion, the work performed eventually passed inspection. The Claimants offered no expert testimony during the hearing to establish that the work performed by the Respondent was unworkmanlike or inadequate. Although the Claimants argued that the deck would prevent access to the HVAC system, that argument was refuted by the Respondent when he testified that he was going to install a trap door as part of the completion of the Project. Additionally, the contractor hired to complete the Project did install a trap door or access panel that would allow access to the HVAC. Therefore, the Claimants’ are unable to establish that the Respondent’s failure to include a trap door to access the HVAC system by the time he stopped working on the Project is either inadequate or unworkmanlike to sustain a finding of an actual loss. The Claimants were unable to prove through testimony or documentary evidence that any of the work performed by the Respondent was inadequate or unworkmanlike. Again, all of the work performed by the Respondent eventually did pass inspection.

The remaining element that could establish an actual loss is whether the Respondent performed an incomplete home improvement. There is no dispute that the Respondent did not complete the Project. However, I find that the Claimants prevented the Respondent from completing the Project by not acting in good faith in allowing him to receive partial payment of \$800.00 to purchase materials, which had increased in cost, to complete the Project. It was not

an unreasonable request of the Respondent. A long time had elapsed since the inception of the contract, due in large part to Mr. Henderson ordering the Respondent to stop work due to the Claimants' financial difficulties. The Claimants, however, were concerned that if they gave the Respondent \$800.00 for materials, the Respondent would not purchase them and keep the money instead. Mr. Henderson, on August 14, 2012, sent a text to the Respondent agreeing that he would pay for the supplies but wanted to be present so that he could inventory the items purchased. (Respondent Ex. #1). When the Respondent's representative visited the Claimants' home to pick up the check, Mrs. Henderson refused to give him the check and began taking pictures of the representative's van as well as the Respondent's representative. I find the Respondent's testimony more credible than that of the Claimant, Mrs. Henderson. The Respondent wanted to finish the job. Mr. Henderson also wanted to finish the job by agreeing to an arrangement that would satisfy his concern about giving the Claimant \$800.00, knowing that it would be used for purchasing materials to finish the Project. Unfortunately, Mrs. Henderson did not agree with Mr. Henderson and the end result was that the Project was never completed by the Respondent despite his good faith efforts to do so.

It is noteworthy that Mrs. Henderson, in her September 25, 2012 letter to the MCDPS, stated that she received some verbal estimates to complete the Project, \$2,000.00 for labor and \$1,700.00 for materials (Claimant Ex. 20), yet she contracted with Abe Remodeling Co., Inc. for labor in the amount of \$4,508.00 and paid \$4,402.51 for materials. It is unknown why Mrs. Henderson would pay much more than double what she was verbally quoted, but it places into question whether the work performed by Abe Remodeling Co., Inc., and the materials used by him were outside the scope of the work to be performed on the Project by the Respondent. Finally, Mrs. Henderson did not call her husband to testify in this case. Had he testified, he could have refuted the statements attributable to him by the Respondent if they were untrue. Mr.

Henderson's failure to refute the testimony of the Respondent causes me to give more weight to the Respondent's testimony concerning the discussions the Respondent had with him concerning the delays in the Project and the final arrangements to complete the Project.

The Claimants are now claiming \$8,910.51 as their actual loss. The Claimants have the burden of proving by a preponderance of the evidence that they are entitled to receive this amount in compensation for the incomplete and unfinished work of the Respondent. The Fund argues that there is a lack of evidence to establish that the Respondent performed unworkmanlike or inadequate work. I agree with the Fund for the reasons previously stated. I also find that the Claimants are not entitled to recover from the Fund for the incomplete and unfinished work of the Respondent. The Claimant, Mrs. Henderson, refused to let the Respondent finish the work after Mr. Henderson and the Respondent agreed to an arrangement to do so and despite the Respondent's stated intention and willingness to do so.

The Respondent acted in good faith to complete the Project, but was never given the opportunity to complete the Project, despite arrangements made with Mr. Henderson. The Respondent was prevented from completing the Project by Mrs. Henderson. Pursuant to §8-405 (d) of the Business Regulation Article of the Maryland Annotated Code, such actions on the part of the Claimants disqualifies the Claimants for reimbursement from the Fund.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Claimants have not sustained an actual loss compensable by the MHIC Fund as a result of the Respondent's alleged acts and omissions. Furthermore, I conclude that the Claimants unreasonably rejected good faith efforts by the Respondent to complete the contract in a workmanlike manner, and thus I am unable, for the reasons stated above, to recommend an

award. Md. Code Ann., Bus. Reg. §§ 8-401 (2010) and 8-405 (Supp. 2014); COMAR 09.08.03.03B(3)(c).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's March 6, 2014 claim; and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

November 19, 2014
Date Decision Issued

Stuart G. Breslow
Administrative Law Judge

SGB/cj
#152912

PROPOSED ORDER

WHEREFORE, this 20th day of January 2015, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

J. Jean White

***I. Jean White
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION